No. 14,553

United States Court of Appeals

For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPORATION, V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A. PRISK, BILL GREGORY, D. HULBERT and GEORGE N. TAUSAN,

Appellants,

vs.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLANTS' PETITION FOR A REHEARING.

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Table of Authorities Cited

Cases

Statutes

Texts

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants in the above-entitled cause present this, their petition for a rehearing in said cause, and in support thereof respectfully show:

(I)

Appellants respectfully invite the attention of this Honorable Court to an apparent oversight in the Court's assumption that invalidity of the contested

Kay Cooper locations is predicated solely upon failure of discovery as required by the Federal Statute 30 USCA, Sec. 23. In their opening and reply briefs appellants have recurrently stressed the necessity for proving the discovery of a vein or lode disclosing a deposit of mineral in place as required by the Nevada statute, Sec. 4121, Nevada Compiled Laws, 1929. (Op. Br. pp. 13, 14, 15-16, 32, 37, 47-48; Reply Br. pp. 12, 18, 20.)

It is quite true that in presenting his case on trial, and also in his Answering Brief, appellee chose to ignore Nevada's statutory requirements for discovery, albeit positive evidence of compliance with controlling State law on the subject is essential to the validation of each of the disputed locations. Section 4121 N.C.L. was enacted in consonance with the delegated power conferred by Congress for supplementation of the Federal law relative to the location of mining claims on the public domain.

The Federal statute neither defines discovery nor requires recordation of a notice or certificate of location, as distinguished from the mandatory requirements of Nevada law. The delegated power was first exercised under rules and regulations instituted by miners in their several mining districts, and later by adoption of appropriate legislation in the sovereign States, as best suited their surrounding conditions and circumstances. (Op. Br. pp. 14, 37-46; Reply Br. pp. 11-13.)

Although the recordation of a Notice of Location or a certificate of location is not required by Federal

law, the Supreme Court sustained as mandatory the Montana statute requiring such recordation in that State. *Butte City Water Co. v. Baker,* 196 U.S. 119, 49 L.ed. 409.) What shall constitute a valid discovery under the mining laws, both Federal and State, is certainly equally as important to the validation of a mining claim as the recordation of a notice or certificate of location.

In so ignoring the State law, appellee coincided with the erroneous conception of Nevada statutory requirements for a mineral discovery adopted by the Trial Court in its Opinion, Findings and Conclusions, which contain nothing on the paramount question of discovery on the disputed claims.

Under Federal law, the posting and monumenting of a mining claim, unless accompanied by diligent efforts toward a discovery, confer no title or exclusive right of possession in the locator, nor under Nevada law, unless compliance is had with the requirements of Secs. 4121 and 4122, N.C.L. 1929 within the time prescribed by those sections; and in any event before peaceable entry and perfection of a discovery by a subsequent locator of the same area. (*New England Coalinga Oil Co v. Congdon,* 92 P. 180, 152 Cal. 211, 213; *Thallman v. Thomas,* 111 F. 277, 279, 49 C.C.A. 317, and other cases cited in Op. Br. pp. 42-3.)

The Federal statute (R.S. 2320, 30 USCA, Sec. 23) requires only the discovery of a vein or lode of mineral-bearing rock in place, with no minimum requirements for exploration or exposure of the vein or lode at depth. On the other hand, Nevada law prescribes

what shall be done by a locator in order to factually establish the discovery of a vein or lode in place, by the performance of exploratory work on the vein or lode to a designated minimum depth beneath the surface. The actual discovery required by Nevada law is distinguished from mere surface indications which may, and frequently do, disappear with the first strokes of a pick and shovel. (Op. Br. pp. 15-16.)

The record convincingly shows that appellee failed to perform anything more than token location work on the Kay Cooper Nos. 6, 8, 9 and 10, consisting of 240 cubic feet of excavation, which appellee's witnesses frequently described as "pits" or "trenches."

In complete disregard of Nevada's mandatory requirement, appellee's attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 are supported by nothing more by way of discovery than the excavation of 240 cubic feet on the surface. In no single instance was such surface excavation prosecuted to the requisite minimum depth of 10 feet, or upon the surface outcrop of an exposed vein or lode of mineral-bearing rock in place.

The certificates of location describe the so-called discovery work as: on the Kay Cooper No. 6, "an open cut" 6 feet wide, 8 feet long and 5 feet deep; on the Kay Cooper No. 8, "an open cut" 6 feet wide, 13 feet long and 3 feet 6 inches deep; on the Kay Cooper No. 9, "a pit", 6 feet wide, 14 feet long and 3.5 deep; and on the Kay Cooper No. 10, a "pit" 5.5 feet wide, 14 feet long and 3.25 feet deep; and in each instance recite the exposure of a ledge, lode or vein in place, but with no mention of mineralization.

The excavation of a pit or trench as location work is not recognized in Section 4121, N.C.L. as an acceptable alternative to the sinking of a shaft at least 10 feet deep, the authorized alternatives being a cut, or cross cut, or tunnel which cuts the lode at a depth of 10 feet, or an open cut along the ledge or lode, equivalent in size to a cut 4 feet by 6 feet by 10 feet deep.

Existing doubts as to the verity and actuality of a discovery on each of the Kay Cooper claims might have been resolved had appellee seen fit to produce in Court the drill cores, core assays and drilling logs essential to the type of testimony furnished by the driller (Joe Federhoff), whose activities extended from the middle of February to the end of March, 1950. (Tr. 76-80.) In the absence of that material data, generalized testimony of the driller is of no probative value; and coupled with J. L. Dougan's relinquishment of his option on June 30, 1950 raises the reasonable inference that there was no sufficient showing to warrant a reasonably prudent man in expending further time and effort on the property.

The record also shows that after acquiring an option on the property from the purported locators, and during the period from September 8, 1949 to April 1, 1950 appellee's grantor, J. L. Dougan, expended upwards of $10,000.00 in surface trenching and diamond drilling on the Kay Cooper group, under the supervision of Lee Dougan, a qualified geologist and engineer, "to determine the probable value in tungsten", in addition to the further sum of $10,000.00 paid to the locators on their option purchase price. (Tr. 81-3, 85, 88.) Appellee's witness, Joe Federhoff

testified that he drilled approximately 700 or 800 feet, but there was no evidence indicating on what particular claim or claims such drilling was performed.

J. L. Dougan relinquished his option on the Kay Cooper group on June 30, 1950 (Tr. 73), and the record is barren of evidence that exploratory work was performed by appellee or his grantors on any of the disputed Kay Cooper locations subsequent to such relinquishment.

(II)

The evidence presented by appellee on the question of discovery does not support the pro forma recitals of discovery contained in the recorded certificates of location required by Sec. 4122, N.C.L. Supp. 1941.

Where recitals in a certificate of location are traversed by competent opposing testimony their force and effect as prima facie evidence under the cited section of Nevada law is ineffectual unless corroborated by a preponderance of supporting evidence, as distinguished from such bare recitals.

> "Recitals of discovery in the recorded notices of location of lode mining claims are mere ex parte selfserving declarations on the part of the locators and are not evidence of discovery."
>
> (*Cole v. Ralph,* 249 F. 81; 252 U.S. 286, 64 L.ed. 567, at p. 580; citing: *Creede and C. Creek M. Co v. Uinta Tunnel M. & Transp. Co.,* 196 U.S. 337, 353, 49 L.ed. 501-509, 25 S. Ct. 266; 1 Lindley 3rd Ed., Sec. 392 and other cases.)

The cited case was tried before a jury in the Nevada Federal Court, and judgment entered for plaintiff on the jury's finding that defendants had made no discovery of a lode location. On appeal to the Ninth Circuit Court, the judgment was reversed, and on certiorari the Supreme Court reversed the judgment of the appellate court and affirmed the judgment of the trial court. In discussing the evidence on the question of discovery in that case, Mr. Justice Van Devanter said:

> "The evidence bearing upon the presence or absence of lode discoveries was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendants contended the other way. Separately considered, some portions of the latter were persuasive, but it was not without noticeable infirmities, among them the following: the defendant testified that no ore was ever mined upon any of the lode claims, and that 'there was no mineral exposed to the best of my knowledge which would stand the cost of mining, transportation and reduction at a commercial profit.' In the circumstances this tended to discredit the asserted discoveries; and a like tendency was his unexplained statement, referring to the claims grouped in this patent application, that 'some of them haven't a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims'—an obviously mistaken view of the law—and his further statement, referring to vein material particularly relied upon as a discovery, that he 'would hate to try to mine it and ship it.' "

The ex parte quality of selfserving recitals in notices or certificates of location is recognized and applied in Nevada. (*Fox v. Meyers,* 29 Nev. 169, 186; 86 Pac. 793; *Round Mtn. M. Co. v. Round Mtn. Sphinx M. Co.,* 36 Nev. 543, 560; 186 Pac. 71.)

> "A certificate of location is not evidence of the fact of a discovery, and such certificate setting forth the date of location is not evidence of a discovery either upon that or any other date."
>
> (*Round Mtn. M. Co. v. Round Mtn. Sphinx M. Co.,* supra.)

> "It is well settled that the basis of location is discovery and that the mere posting of a notice without a discovery is of no force or effect so far as rendering invalid another location covering a portion of the same ground based upon a valid discovery."
>
> (Idem, at p. 560—citing: *Patchen v. Keeley,* 19 Nev. 404; *Gibson v. Hjul,* 32 Nev. 36; *Overman v. Corcoran,* 15 Nev. 147; *Fox v. Meyers,* 29 Nev. 169; *Nash v. McNamara,* 30 Nev. 114; *Creede Mining Co. v. Tunnel Co.,* 196 U.S. 337; *Uinta Co. v. Creede Co.,* supra; *Nevada Oil Co. v. Home Co.,* 98 Fed. 678; *Tuolumne Co. v. Moier,* 134 Cal. 583; *Weede v. Snook,* 144 Cal. 439.)

Location can rest only on actual discovery, and without discovery no rights can be acquired save the right to maintain pedis possessio while diligently seeking to make discovery. The recitals in a location

notice or certificate, or mere possession without diligent efforts toward discovery create no presumption of discovery.

(III)

The Nevada case of *Cole v. Ralph* (supra), in its evaluation of conflicting evidence on the question of discovery, is also exceptionally illuminating when considered in relation to appellant's well justified stand on that question as applied to the case at bar.

As viewed by the Supreme Court in the cited *Nevada* case, persuasive evidence of discovery was not sufficiently convincing to validate the challenged lode locations. The holding in that case is particularly significant, both as to the absence of positive evidence of an actual mineral discovery on any of the disputed Kay Cooper locations, and to appellee's implied theory that evidence of discovery anywhere in the located area may be applied at will to any contiguous claim in the group. That untenable theory is clearly indicated by appellee's acceptance of the indefinite testimony furnished by his witnesses in response to generalized questions directed to the group as a whole, and not specifically to each individual location. (Op. Br. pp. 20-22, 24, 29; Reply Br. pp. 3-7.)

The record discloses no positive evidence of discovery on Kay Cooper Nos. 9 and 10, and we must respectfully urge that where the evidence presented "is not particularly satisfying" and "unclear as to

whether or not the ore was in place," as noted in the Opinion of this Honorable Court, the invalidity of those claims is no longer open to question.

In the absence of evidence that the tungsten ore, allegedly found in the cuts or discovery holes by appellee's mining witnesses, was in place within the commonly accepted meaning of the words "in place," it was not necessary for appellants to establish that such tungsten ore was merely float.

Appellee had the burden of proving a discovery of ore or mineralized rock in place on each of the disputed locations prior to appellant's completed discovery on each of the Ray Ricketts locations, and failed to meet that burden. Carl H. Cooper, a co-locator of all of the Kay Cooper claims, described the location work on Kay Cooper "Nos. 6 to 11" as: "The same as the past, open cut, 240 cubic feet or more each and every one of them." (Tr. 128-9.) The witness stated that he found ore in the location cuts, but did not state, and was not asked, whether the ore was in place.

Testimony of the co-locator, R. C. Peterson, was to the same effect, discovery work being described as "a hole in the ground * * * measured over 240 cubic feet of ground moved." (Tr. 182); "open cuts and such as that." (Tr. 185.) This witness testified that he found mineral in Kay Cooper Nos. 1 to 5 (which are not in dispute), but did not testify, and was not questioned, as to mineralization in Kay Cooper Nos. 6, 8, 9 and 10. (Tr. 184-5.)

The remaining lay witness for appellee (Albert Brown) furnished no evidence on Kay Cooper Nos. 6, 8, 9 and 10. (Tr. 218-253.)

Neither of appellee's expert witnesses (Victor E. Peterson and Lee V. Dougan) called by appellee in support of the claimed discoveries, was sufficiently familiar with the Kay Cooper locations to be able to testify, and was not questioned, as to the existence of a vein or lode required by Federal law, or as to the existence of a lode deposit of mineral in place required by Nevada law. (Op. Br., p. 27; Reply Br. p. 7; Tr. p. 212.)

All that can be reasonably deduced from the testimony of the witness, Victor E. Peterson, is that on Kay Cooper No. 8, "there is a definite showing on the rock on the surface" and that on Kay Cooper No. 6 tungsten "is very definitely in place." (Op. Br. p. 27; Tr. 211-213.)

A showing on the rock on the surface, in the absence of further elucidation as to the extent of such showing, and whether the rock was contained in a vein or lode in place, is wholly inadequate to establish a valid discovery on Kay Cooper No. 8. Considered at its face value, and disregarding appellants' evidence to the contrary, the mineral showing on Kay Cooper No. 6 would suffice to meet the Federal requirements for discovery if the witness had also testified that the mineral in place was contained in a lode or vein, (Reply Br. pp. 7-9), supported by other evidence on the record that sufficient exploratory work had been

performed thereon to meet the requirements of Nevada law.

(IV)

The only testimony that the parties are claiming the same vein or lode was furnished by appellee's closing witness in rebuttal, Lee V. Dougan, who testified regarding seven trenches dug on one or more Kay Cooper locations. (Tr. 396-8, Pltff's Ex. 17.)

Excepting as to the Kay Cooper No. 2 location, which is not in dispute, it cannot be definitely determined from Mr. Dougan's testimony on what particular location the trenches were dug. (Tr. 396.) With no previous mention of Kay Cooper No. 8 the witness was asked:

> "Now in these trenches that you have testified to on Kay Cooper No. 8 and Kay Cooper No. 2, did you find ore in place?"

The witness answered affirmatively, over appellants' objection, (Tr. 397), then testified that he found veins on both Kay Cooper No. 2 and Kay Cooper No. 8, that "they had just a little showing," and that they were the same veins as exposed in the workings of Nevada-Pacific Development Corporation. (Tr. 398-9.)

There was no testimony by the witness of any trenching or vein exposures on Kay Cooper Nos. 6, 9 or 10.

Questioned by appellants, the witness further stated that he is not familiar with the discovery work on any of the Kay Cooper locations. (Tr. 400-1.)

On this state of the record, appellee's identification of a vein or lode solely upon the Kay Cooper No. 8 raises no presumption, in the absence of other evidence, that a similar condition exists on Kay Cooper Nos. 6, 9 and 10.

As to Kay Cooper No. 8 the question still to be determined is: which of the contending parties was first in time in perfecting an authentic discovery? That question is clearly answered on the record.

Appellee's exploratory trenching, which supplemented the token efforts of the locators but still lacked compliance with Nevada's requirements for discovery, was performed during the period of J. L. Dougan's option, from September 8, 1949 to the latter part of June, 1950. (Tr. 395.) As mentioned above, the Dougan option was relinquished on June 30, 1950, and thereafter appellee performed no further work on any of the disputed locations prior to appellants' location of Ray Ricketts Nos. 1, 2 and 4 on February 8, 1951, and the completion of discovery on each of those claims by April 6, 1951 in full compliance with Federal and State laws.

It is axiomatic that priority of discovery gives priority of right against naked location. (Op. Br. pp. 42-3.)

(V)

Appellants respectfully suggest that affirmation of the Trial Court's findings and decree requires that they be supported by sufficiency of the evidence, and not merely supported by evidence. (Op. Br. 48-9.)

(VI)

For the reasons above stated, appellants' request that a rehearing be granted and that upon such rehearing the judgment of this Honorable Court be reversed.

Dated, November 7, 1955.

Respectfully submitted,

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Certificate of Counsel

Nevada-Pacific Development Corporation et al. by their attorneys, hereby certify that the within and foregoing Petition For Rehearing is not presented for the purpose of delay, and in the opinion and judgment of counsel, is well founded in law and properly filed herein.

Dated, November 7, 1955.

Walter Rowson,
Of Counsel for Appellants and Petitioners.